

30 W.S.L.L.C. v Andrews
2019 NY Slip Op 31443(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 157538/2018
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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30 W.S.L.L.C.,

Plaintiff,

- v -

PETER ANDREWS, GREGORY PALMER

Defendant.

INDEX NO. 157538/2018

MOTION DATE 12/21/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY

The following facts are undisputed. Plaintiff and Dreambuilder Investment, LLC ("Tenant") entered into a lease on October 20, 2008 and later extended by amendment on January 25, 2010. The payments of the lease were guaranteed by defendants Andrews and Palmer and extended with the amendment. This is the second action involving the non-payment of rent due under the lease. Plaintiff therein (Index #156112/2017) sought the damages relating to non-payment of months prior to August 1, 2017 based upon a stipulation of settlement entered into between the parties in a summary non-payment proceeding. In this action, plaintiff seeks the remaining moneys allegedly owed from August 1, 2017 through June 2018, when the premises were sold, and this plaintiff ceased to accrue moneys owed. In the first action, this Court granted plaintiff summary judgement and held that plaintiff had established its prima facie entitlement to the moneys owed through the submission of the exhibits to this motion, including but not limited to, the lease, guaranty, amendment to lease, rent ledger and affidavit.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (Integrated Logistics Consultants v. Fidata Corp., 131 AD2d 338 [1st Dept

1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The Appellate Division recently held that a plaintiff seeking summary judgment succeeded in making “a *prima facie* showing for rent arrears accruing. . .by submitting the original lease. . .and a detailed statement documenting outstanding rent arrears” (*Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 641 [1st Dept 2017]).

Here, plaintiff has again submitted the lease, guaranty, amendment to lease, rent ledger and affidavit of Amalia P. Sylkes as well as the purchase and sale documents related to plaintiff’s sale of the building and the retention of certain rights to the arrears. In addition Section 19.1 permits this action (*see in Holy Properties Limited, L.P. v. Kenneth Cole Productions, Inc.*, 87 NY2d 130 [1995]). Therefore, plaintiff has successfully made its requisite *prima facie* showing.

Thus, to defeat summary judgment, defendants have the burden to demonstrate by admissible evidence the existence of a factual issue requiring a trial (*see Zuckerman*, 49 NY2d at 557). Defendants has failed to do so. In the answer, defendant raised three defenses. The first was that the Complaint failed to state a cause of action. Said defense is patently incorrect as plaintiff

has properly stated a cause of action for breach of contract. The second defense was that plaintiff elected to forego its rights and is not supported by anything in the record. The final defense is that plaintiff lacks standing. Said defense fails as stated above based upon the establishment of plaintiff's *prima facie* burden, including the guarantee and lease. In opposition to plaintiff's motion for summary judgment, the sole argument raised relates to the application of the security deposit. Defendant seeks discovery to find out how the security was applied. It is undisputed that the amount of security in question is \$226,934.00. Plaintiff's judgment in the first case is through July 31, 2017. Plaintiff does not seek arrears for the months of August – October 2017, and only seeks a portion of November 2017 through June 2018. In the affidavit of Amalia P. Sylkes, plaintiff explains that it applied the security deposit to those months. Defendant does not raise any dispute as to the monthly amount sought and does not raise any genuine issue as to the application of the security deposit to those months not sought by plaintiff. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted, and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against all defendants in the amount of \$373,057.25 for rent and additional rent, with interest thereon from November 15, 2017 at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that that plaintiff's cause of action seeking attorney's fees is granted to the extent of setting down the issue for a hearing. A hearing is granted to determine the amount of fees to be awarded. Plaintiff shall cause the matter to be placed upon the calendar for such trial. Plaintiff shall, within 20 days from the date of this order, serve a copy of this order upon (counsel for) all parties hereto by regular mail and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of

readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

4/29/2019
DATE



DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON. DAVID B. COHEN
J.S.C.